

Effective Appellate Advocacy Appellate Defender Training 2017

Overview of Ideas Collected by Travis Stearns



NLADA

National Legal Aid &
Defender Association

Acknowledgements

For many years, Ira Mickenburg has taught appellate defenders how to be effective advocates. If any of the material in this manual appears familiar, it is because just about everything successful appellate advocates have done for indigent clients relies upon his fundamental principles of advocacy. These materials rely heavily upon past Appellate Defender Training materials, especially those prepared by Ira.

TABLE OF CONTENTS

- INTRODUCTION..... 1
 - A. Appellate advocacy is client focused. 1
 - B. Appellate advocacy is a creative process..... 1
- BRAINSTORMING 2
 - A. Brainstorming helps you develop your narrative. 2
 - B. Why you should brainstorm..... 2
 - C. How to brainstorm. 2
 - D. What to do with brainstormed facts..... 3
 - E. The process of brainstorming. 3
- DEVELOPING A THEORY OF APPEAL 5
 - A. Decide what was unfair about your client’s conviction..... 5
 - B. Identify legal issues supporting your theory of appeal..... 5
 - C. Draft a theory of appeal. 5
- STORYTELLING 7
 - A. Telling the story of injustice at trial. 8
 - B. Innocence and the harmless error standard. 9
 - C. Making the story your own. 9
- WRITING PERSUASIVELY 11
 - A. Personalize your client. 11
 - B. Keep it short and simple. 11
 - C. Stick to the active voice..... 12
 - D. Use graphic and colorful language..... 12
 - E. Concentrate on your style..... 13
- STATEMENT OF FACTS 15
 - A. Incorporate your theory into your statement of facts. 15
 - B. Include facts relevant to your argument. 15
 - C. Tell your story..... 15

D. Do not waste space.....	16
E. Make your brief easy to read.....	16
ARGUMENT.....	17
A. Begin with your theory of appeal.....	17
B. Lead with the best facts.....	17
C. Write in a visually appealing way.....	18
D. Be accurate.....	18
E. Rely upon cases where the defense has won.....	18
F. Do not take shortcuts.....	18
EDITING.....	19
A. Self-editing.....	19
B. Using an editor.....	20
APPENDIXES.....	21
THEORIES OF APPELLATE DEFENSE.....	22
POTENTIAL ISSUES IN CRIMINAL CASES.....	23
COPY EDITOR’S CHECKLIST.....	25
ORAL ARGUMENT CHECKLIST.....	27

INTRODUCTION

Judges reverse convictions only when they believe the decision the trial court made resulted an injustice. To win an appeal, you must develop an emotionally compelling story based not on the law, but upon facts that will appeal to your judge's sense of right.

To be successful on appeal, you must persuade the court your client should not have been convicted, either because your client was innocent or the process was so unfair your client deserves another chance to tell their story.

Focus on the facts

A. Appellate advocacy is client focused.

As defenders, our greatest asset is our client. Our clients drive the goals of our advocacy and are an enormous resource we develop our arguments. Include your client in your issue selection process and the development of your arguments. Engaging in participatory defense in appeals is a rewarding process for both you and your client.

There are times when you will raise issues because they are important to your client. Many times, these can be the issues you prevail on. Even when they are not, briefing the issues that matter to your client achieves the purpose of client centered representation and will leave a client who did not prevail on their appeal satisfied with their process.

B. Appellate advocacy is a creative process.

Start with the facts and work towards the law. Identify what bothers you about the case. Think about what you feel is wrong, more than what is illegal. Once you have identified what you think should be changed, find the law to support your argument.

Because appellate court judges make the law, appellate advocacy is an opportunity for you to change the law. When make arguments based upon what you think the law should be, you create the opportunity for the court to make the changes you believe are necessary. For almost every argument you make, you can find some support, even if only from concurrences or dissents.

BRAINSTORMING

One of the greatest obstacles to winning an appeal is the tendency to accept the government's version of the facts. This is a bad place to start the process of identifying issues for appeal as it is the same story that led to your client's conviction at trial. To win your appeal, you must develop a different factual narrative from the one the prosecutor used to convict your client at trial. You must change the narrative if you hope to change the results for your client.

Developing a better factual narrative is only possible when you have first explored and analyzed your facts in depth. This allows you to develop your theory of appeal upon the facts of your case and to find a compelling reason for why you should win.



Change the narrative

A. Brainstorming helps you develop your narrative.

Brainstorming is a process intended to help you develop the facts of your case and find ways to achieve your client's goals through their appeals. It is a way to make decisions on what will work in your case and the first step to developing a successful opening brief.

B. Why you should brainstorm.

Brainstorming helps you to see perspective. When you have spent hours reviewing the record, you have already become so involved in the facts of your case that it becomes easy to overlook winning ideas and the supporting facts.

Involving other persons in a brainstorming process allows you to see your case from other perspectives and to develop new ideas you may not have considered. It also allows you to eliminate ideas you felt were strong, but are not emotionally compelling to those you brainstorm your case with.

C. How to brainstorm.

Brainstorming is a formal process where you meet with your colleagues to develop and analyze the facts of your case. Start by identifying what bothers you about the case and be prepared to share it with your brainstorming group.

Remember that brainstorming is fact based. Focus upon what you think happened in your case that was wrong and worry about the legal support for it after you have brainstormed your issues.

1. *Be inclusive with your facts.*

As you start your brainstorming process, you want to include as many facts as possible. As you process your case, you will decide which facts matter and which do not. When sharing your case during a brainstorm session, tell the participants as much as possible.

2. *Do not be judgmental.*

This is a non-judgmental process. As you brainstorm your case, you should not divide your facts between those you consider “good” or “bad” facts. The purpose of brainstorming is to determine which facts are helpful to your theory of appeal. Often, our initial judgment about which facts are important turns out to be wrong.

3. *Be associative.*

Once you begin the process of brainstorming, you begin to associate between the facts generated and ideas to include in your brief. This formulates better arguments. You may also discard arguments you believed were very strong in favor of better ones. You will certainly be able to better frame the arguments you are making.

D. What to do with brainstormed facts.

The brainstorming process should provide you with a basis to develop a persuasive theory of appeal. Once you have completed this process you should have a good idea of the issues in your case and a strategy in how to create your successful appeal.

This process remains organic. As you continue to research your case, you may change your arguments and add to them. Do not feel that once you have brainstormed a case you should not continue to develop your theory of appeal.

E. The process of brainstorming.

Brainstorming works best as a formalized process you intentionally plan for. Create a group to brainstorm with and include non-lawyers if they are available.

Set aside enough time for a complete discussion of your issues. Provide everyone with essential documents and then tell the story of your case. While it is fine to define issues, do not close off discussion of issues you have not considered. Allow time for questions and then let your group think through your case. Try to stand back during this period so that your group has the space to develop stronger ways to argue issues you identified and to craft arguments you had not considered.

Brainstorming Process

Create your brainstorming group

- Try to include three people to facilitate a real exchange of ideas
- Include non-lawyers to provide real perspective

Set aside enough time for a full discussion

Provide everyone with essential documents

Start with a short summary of your case

- It is ok to define your problem
- Do not restrict the conversation about other issues

Allow time for questions from the group

Allow the group to brainstorm

- Try to stay quiet
- Do not defend your issues

Write down everything people said

DEVELOPING A THEORY OF APPEAL

Ask “what was unfair?”

A. Decide what was unfair about your client’s conviction.

The first step in creating a compelling brief is to ask the question “what was unfair about the case?” This is a factual and emotional question and does not yet address the legal analysis you will have to do to. In developing your theory, you should think about what upsets you about the facts of your case or the process leading to your client’s conviction.

This analysis depends upon the facts of your case. The facts you rely upon to develop your theory of appeal can be about the crime, the police investigation, the pretrial process, the trial or the sentence. To do this, read the entire transcript and all of the motions and other materials used in court. This should include electronic media the government used in their openings and closings.

Speak to your client. They will have an excellent understanding of what was unfair about the trial. When talking with trial counsel, do not just ask about the legal issues. Trial counsel can tell you about what happened in the lower court you might not discover elsewhere.

B. Identify legal issues supporting your theory of appeal.

When you begin to read your transcript, create a separate document or a section in your notes where you write down issues that do not feel right to you. As you take notes, add any references to your issues on this page.

Once you have identified a good legal issue, ask whether the issue contributed to the unfairness of the trial. Not all legal errors are going to compel a court to reverse. Your analysis should concentrate on issues that give the court both the legal and emotional justification to rule in your favor.

C. Draft a theory of appeal.

A theory of appeal is a short written summary of factual, emotional and legal reasons why the court should reserve or reduce your client’s conviction. It tells your client’s story of injustice or innocence and addresses and resolves any difficulties the court may have about reaching the decision you want.

1. *Write your theory down.*

By writing out a paragraph for yourself, you focus and articulate your theory. Your theory paragraph is created solely for yourself and acts a guide as you plan your brief.

2. *Keep your theory factual.*

Like all people, judges are persuaded by facts and not general principles. A good theory of appeal takes into account all of the facts of your case, highlighting the favorable ones and resolving the unhelpful ones.

3. *Make your theory emotional.*

An emotional theme makes the judge aware of the injustice done to your client. This is critical in getting the court to accept your theory of appeal. When all the court is asked to do is to rule upon a legal principle, the court will agree in spirit with your argument, but find a way to rule against your client.

4. *Articulate a legal claim.*

Your theory of appeal must have a legal basis. A solid legal argument supporting your emotional and fact based theory is essential to success.

5. *Tell your client's story.*

The most persuasive arguments involve compelling factual stories. A good theory of appeal tells a moving story and explains how and why your client should win. This guides the facts you need to gather to tell your story to get the court to accept it.

STORYTELLING

Let the facts move us

While no appeal can be won without sound legal argument, the most important part of your brief is the story you tell. This should be done in the introduction, the statement of facts and throughout your legal argument.

Storytelling is the primary way people pass information to each other. Storytelling predates writing. It is how information is passed on from one generation to the next. We find strong story tellers everywhere: in politics, religion, business, and in our courts. A powerful story engages the reader and draws them into your brief.

Storytelling is effective. In a study where briefs were submitted to judges and law clerks that relied heavily upon either storytelling or legal analysis, most readers found the briefs incorporating storytelling more persuasive. The more experienced the reader, the more they found the storytelling briefs to be effective. You can read more about this in Kenneth Chestek's article, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 *Journal of the Ass'n of Legal Writing Directors*, 1-35 (2010).

For the appellate defender, storytelling is critical. Just like everyone else, facts move judges. Judges are not inclined to reverse and only will do so when they are convinced to do so through the story you tell.

Judges want to be persuaded everyone else. They want to feel as if they are doing the right thing.

Courts will focus upon

- Did your client do it?
- Was your client's trial and sentence fair?

The story you tell should not necessarily be the story of the crime. While the events of the crime must be part of your story, they do not have to be the focus. The story you tell should not be told the same way the police and prosecutor told it. This story has already been told and does not end well for your client.

Telling a good story requires a theme. Persuasive stories in appellate briefs focus upon the injustice of the trial and your client's innocence or reduced culpability.

Persuasive stories focus upon:

- The injustice of the trial, including:
 - The unfair rulings of the trial judge
 - The improper, unfair conduct of the prosecutor
 - Other unfair conduct at the trial or sentence hearing
- Your client's innocence or reduced culpability

Remember these are your starting points. Once you have identified a focus, think about how to best tell your story.

A. Telling the story of injustice at trial.

Most stories fall into a category of reversible error, or why the trial was not fair. When you are developing the story of your defense, it is likely it will fit into one of these categories.

Theories of Appellate Defense

- Structural error occurred that cannot be corrected.
- The judge made a bad ruling, resulting in prejudice.
- The prosecutor did something bad resulting in prejudice and the judge could or would not stop it.
- The prosecutor did something bad the judge facilitated, resulting in prejudice.
- The police or some other witness did something bad, resulting in prejudice.
- A juror did something improper, resulting in prejudice.
- Some external event prejudiced the trial.
- The defense lawyer did something improper, resulting in prejudice.
- The evidence was insufficient to support the verdict.

These categories are arranged in order of effectiveness. Ineffective assistance and sufficiency of the evidence are the least likely to prevail. If you are able to frame your issues in one of the other categories, you are far more likely to see success.

B. Innocence and the harmless error standard.

Unless you are raising a claim of insufficient evidence, your story will not be explicitly about your client's innocence. When you are writing the facts of your case, emphasize the weakness of the prosecutor's evidence and show how, had the trial been fairer, the jury would have found your client not guilty. This will both help to persuade the court that your client's conviction was fundamentally unfair and help you overcome the inevitable issue of harmless error.

C. Making the story your own.

When you are crafting your story, you must make conscious decisions about every action you take.

1. Order

Your story should grab the reader from the start. Start by determining the best place to begin your story. Frequently, this is not where the prosecutors start their stories. Instead, your story is likely to begin with the errors you expect to raise.

If the injustice occurred in the courtroom, for example, your story should start there. Only after you have drawn your reader into your story should you focus on other events.

Leave irrelevant events out of your story. If your story is about an illegal sentence, you do not need to tell the story of the crime, except to the extent it is necessary to focus on the sentence your client received.

Do not fall into the trap of telling the same story that was told at trial. The easiest way to write a brief is to follow the procedure as it was told in the trial court, starting with the crime, then the investigation and finally with the trial. This is an easy way to tell the story, but rarely effective. It mirrors the prosecutor's brief and tells a story you have already lost.

2. Characters

Create characters. Think about the roles they play and how you want them to be perceived.

For example, where you are arguing misconduct, the prosecutor is probably going to be your villain. But where the prosecutor has conceded an issue and the judge refuses to make a fair ruling, the role of the villain changes.

3. Scene

Where do the most important parts of your story take place? If your story is about the confession your client made, develop what the room was like where your client confessed. Create an image for the judges so they can identify with your story and understand its sequence.

Think about what must be included in the scenes to make the story persuasive. You may focus much of your story on a particular scene, giving little, if any time to other scenes where the story of your case took place.

4. Perspective

Deciding how to tell your story also requires deciding whose perspective to tell it from. This can be one of the most challenging parts of brief writing, because it is not part of the training we have received in how to write a legal brief.

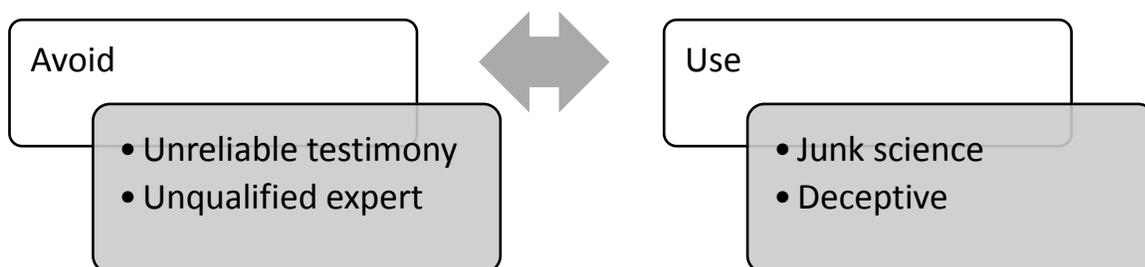
But telling your story from the right perspective draws your reader in and keeps them involved. Focusing on who should tell the story, and from what point of view, gives your reader a better understanding of the story you are trying to tell.

5. Emotion

Every effective story has an emotional pull. Your goal in drafting your brief is to determine not only how you want the judge to think when they have finished reading your brief, but how they should feel. This is achieved through the process of storytelling, using scene, sequence, perspective and character to leave your judges with an emotional response to the story you have told.

6. Language

The most effective stories are those we relate to. Use plain language. Avoid legalese and the use of the government's language.



WRITING PERSUASIVELY

Your story is told throughout your brief and not just in your statement of facts. An effective brief is one where the reader is able to tell quickly why your client was aggrieved and what relief they are entitled to. The story should be apparent in your table of contents, your introduction and throughout your legal argument.

Tell your story honestly and do not ignore the bad facts. You want to persuade your readers but not make them feel you were dishonest when you told your client's story.

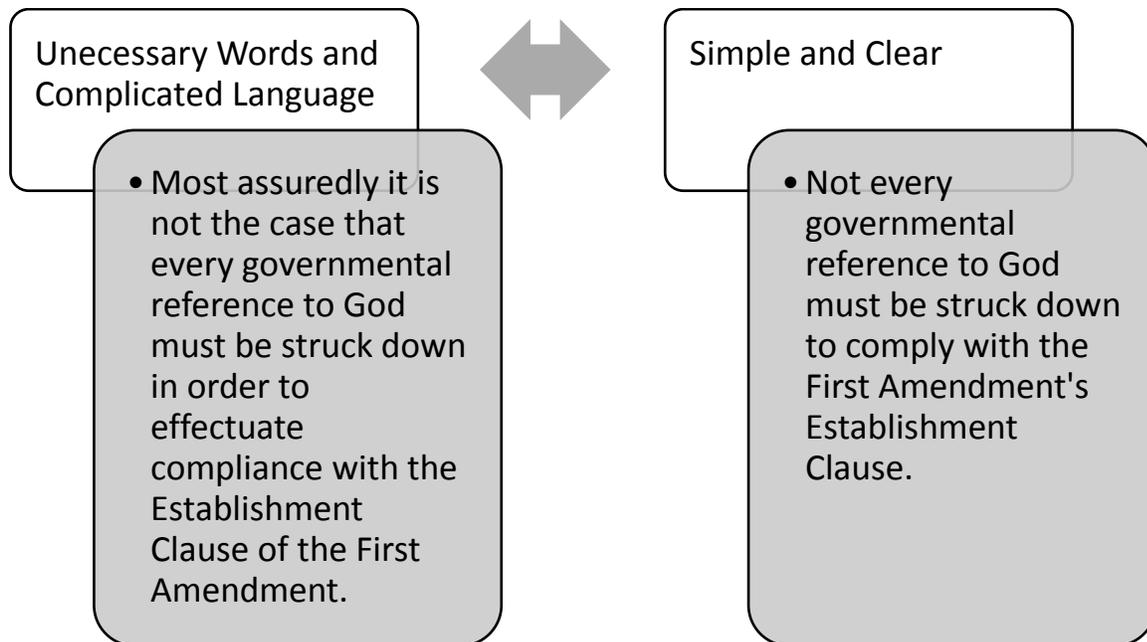
A. Personalize your client.

Avoid using words like "defendant," "accused," or "appellant" to describe the person you represent. Use your client's name and other descriptors that get the court to think of your client the way your client to be understood and perceived.

It is much easier to affirm someone the court thinks of as a "killer" or "sexually violent predator" than it is to deny relief to a human being.

B. Keep it short and simple.

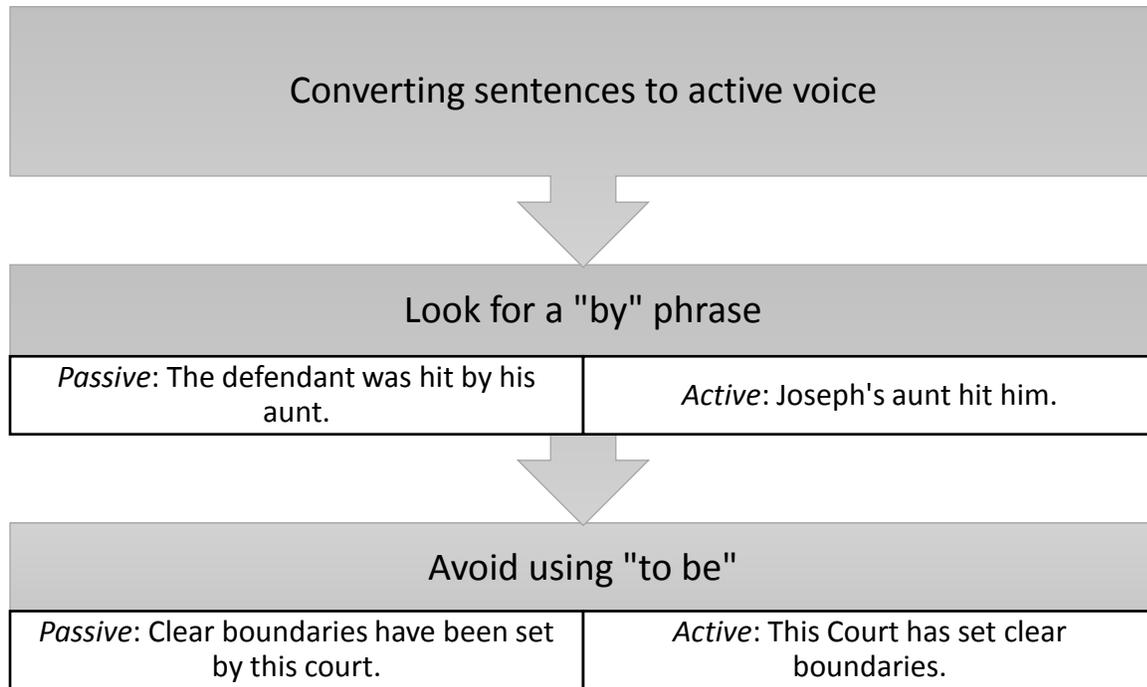
Eliminate unnecessary words and phrases. Keep your paragraphs short and clear.



Arguments are more persuasive when they are easy to understand. Short and medium length sentences are easier to read as they allow the reader to absorb and contextualize your arguments.

C. Stick to the active voice.

At the heart of every good sentence is a strong and precise verb. In an active verb sentence, the subject performs an action. In passive sentences, the subject receives the action.



Good reasons exist for using the passive voice. Use the passive voice when you want to emphasize the action rather than the actor. This technique is useful when you seek to deflect attention away from something, while ensuring your reader is aware of it. The passive voice helps to soften facts and actors.

D. Use graphic and colorful language.

The language you use to communicate your story is crucial to convincing the court you are right and are entitled to relief.

Use graphic and colorful language to draw your reader in. A person does not just stand; they can “cower,” “lurk,” “fidget,” or “loiter.” Choosing more descriptive words will give your reader a better sense of the scene you have created for them.

Avoid the use of legalese. You have not made an effective argument when your reader is trying to remember what the word means or has to think about the context.

Stay away from the language the police and prosecutors use. For example, people do not “exit vehicles,” they “get out of cars.” Do not adopt language that is used to persuade judges your client is guilty, such as “sexually violent predator,” or the word “victim” to describe the person claiming your client hurt them.

Legalese and other words to avoid

- Comes now
- Defendant submits that
- Cases have clearly held
- It can be argued
- The instant case
- Said witness
- Aforesaid
- To wit

E. Concentrate on your style.

1. *Write in short sentences.*

Shorter sentences are effective. They keep the story going and move your reader forward.

If on the other hand, you want to create the impression something took a long time to resolve and was very complicated, lengthen your sentences to give the reader an understanding of how long and tedious the action was.

Think about whether you can shorten your sentences when you edit your brief. Split your compound sentences into two. Put conditions and exceptions into separate sentences. Repeat your subject if necessary. Avoid unnecessary prepositional phrases.

If you have a long sentence, follow it with a shorter one. This is a powerful tool for focusing the reader and allows the reader to absorb what they have just read.

2. *Limit your use of prepositional phrases.*

Avoid using too many prepositional phrases. These can distract the reader and slow down their comprehension of your argument.

3. *Quote sparingly.*

Quote sparingly. When you quote, reduce the quote to the key language. Quote only reasoning and rules. Do not quote facts. Use brackets and ellipses in altered quotes.

4. *Connect your writing to make it flow better.*

Put old information before new information. Do not make your reader wait to see the connection between your sentences. Instead, show the reader where you are going and how the new information fits into what you have already written. Make sure you are connecting your subjects, especially when you are writing about the law.

5. *Use gender neutral language.*

Rephrase your sentences when possible to avoid unnecessary gender specific pronouns.

A judge may issue a cautionary instruction if he believes one is warranted.

- Judges may issue a cautionary instruction if they believe one is warranted.
- A judge may issue a cautionary instruction if the judge believes one is warranted.
- A judge may issue a cautionary instruction if the circumstances warrant one.
- The trial court may issue a cautionary instruction if it believes one is warranted.

6. *Avoid ambiguity.*

Make sure your reader knows who and what you are talking about. When you are using a pronoun, ensure there is a clear link to the earlier subject. Where it is not clear, use the subject's name instead.

7. *Illustrate points with graphs and pictures.*

Many of your readers will respond to visual images in a way the written word cannot grab them. Incorporating pictures, maps, charts and other images into your briefs is an effective tool to draw your reader in.

STATEMENT OF FACTS

Tell your client's story

The statement of facts is your opportunity to tell your client's story. Start your story in a way that creates a favorable impression of your client and of your case. You will get to the bad stuff eventually, but it is important to establish the favorable context in which you want your reader to view the negative parts of your case.

A. Incorporate your theory into your statement of facts.

While your statement of facts should not be argumentative, they must focus upon the unifying themes of your case. Use your statement to describe what happened, focusing upon the facts that are important to the theory you will develop in your argument.

B. Include facts relevant to your argument.

Focus on the facts that are important to your story, but do not ignore those facts which make it hard for the judges to rule in your favor. Embrace unfavorable facts and anticipate ways you will be able to resolve them. There is nothing wrong with emphasizing favorable facts, but it is dangerous to ignore harmful facts. You can be sure the prosecutor and the court will not.

C. Tell your story.

Use the statement of facts to sway your reader. Create a picture of the scene. Make deliberate word choices. Start the story where it matters.

Questions to think about as you are preparing to tell your story include:

1. *Determine who your audience is.*

In almost all cases, your audience is the judges deciding your case, but your audience also includes the law clerks first assigned the file. The clerk will certainly identify issues for the judge and is likely to write the initial opinion for the judge. As you are telling your story, you want connect with both readers.

2. *Write consciously.*

At the end of your statement of facts, the reader should understand the legal issues in your case. Think about whether your writing advances your theory of appeal. Make sure your writing does not routinize your client.

3. *Create context.*

From the start, your reader should know the focus of your case. Start your statement of facts with the facts that matter. Include headings and sub-headings so your reader can follow your story easily.

D. Do not waste space.

A statement of facts does not need to be very long. Each sentence must have a purpose: to tell your story, provide necessary background, transition to a new event, or distract from a negative fact.

The statement of facts should not be overly long. The facts that are relevant to your argument will also be included in your argument. The argument section should take up the bulk of your brief.

E. Make your brief easy to read.

When referencing the record, make sure you cite to it. You want the court to use your brief as a guide when it is writing its decision. Making the brief a tool for the court makes it more likely to court will use your brief as the cornerstone of its argument.

1. *Use headings and subheadings.*

Headings allow the reader to understand why you are focusing upon particular facts. Within each section, you should have headings that are particular to the facts of your case.

2. *Build the story you are telling in an easy to understand way.*

Your reader should not be surprised by facts as they read your brief. New information you present in your statement of facts should build upon what preceded it. Each paragraph should link to the one before it and move your story forward.

3. *Start and finish strongly.*

You want your reader interested in your argument when they start reading and ready to take action after they have finished. Rely upon principles of primacy and recency to highlight the important issues for your judges and their clerks.

ARGUMENT

Focus on the story you told

When writing your argument, focus returns to the story you have already told. While this is a section of your brief where you will be referring to the law and arguing about why your client should win, do not forget that we win our cases because of the emotional stories we have told and not because we have the law on our side.

The argument you make must be fact driven. It should engulf the court with the emotion of your case. The law is the vehicle that drives your fact based argument.

To write an effective argument

- Open with your theory
- Lead with your best facts
- Make intentional word choices
- Write in plain language and stay away from legalese
- Use quotes when helpful but avoid long quotes
- Organize the facts in a visually appealing way

A. Begin with your theory of appeal.

Your argument should begin with your theory. This allows you to emphasize facts helpful to your case and to downplay unhelpful facts. It also helps you to set the tone and the emotion for the appeal. When you begin your argument with your theory, it organizes your brief in a way intended to convince the judges they should rule in your favor.

B. Lead with the best facts.

Do not bury facts that help you in the middle of your argument. Let the reader know why your client deserves relief and how the law supports your client's story.

Leading with your facts allows you to set the tone and emotion of the appeal. Judges who read your brief will understand what matters to them and why they should rule in your favor.

C. Write in a visually appealing way.

When organizing your argument, think about ways to make your writing easy to follow and captivating. Include headings, charts, tables, time lines, documents and pictures. Start new sections at the top of the page where they are easy to read.

D. Be accurate.

Appellate judges are looking for ways to affirm the trial court's rulings. It is crucial that you accurately portray the facts and the law when crafting your argument.

E. Rely upon cases where the defense has won.

Many cases where the defense did not prevail have powerful language supporting your position. When you have found language in a case you like, make sure the court ruled properly. Seek out cases where the defense prevailed to support your arguments.

F. Do not take shortcuts.

Each case is different. It is rare that copying a brief will make for a strong argument. You own your cases when you write your own arguments. This gives you the confidence to prepare stronger briefs. It also saves time when you are preparing to argue your case to the court or when you write additional briefs or petitions to higher courts.

EDITING

The best briefs are those a colleague edits for content and style. An editor will tell you whether the arguments you have written make sense and can find mistakes you did not see.

Become the reader

A. Self-editing.

Before asking a colleague to edit your brief, spend some time making final edits.

Start the editing process by printing out your brief and reading it out loud. You are more likely to see mistakes on a printed page and you will notice awkward sentences when you read it out loud.

Eliminate uncertain statements, remove repeated sentences, consider word choice, check consistency of verb tense, and make sure your cites are complete.

Editing Tips

- Read aloud
- Use a hard copy instead of the computer
- Take breaks
- Cut unnecessary words and phrases
- Make conscious decisions about active and passive voice
- Eliminate crutch words, clichés and awkward transitions
- Use left justification and start new sections at the top of pages to create white space
- Vary sentence structure
- Try to stay within the page limit

B. Using an editor.

Using an editor will save you both time. When you have someone else reading your work, you begin to share ideas. This helps you build and improve your practice. Even where your office does not have a formal editing process, ensure you create one for yourself so that you can produce the best briefs possible.

Give your editor enough time to do a thorough job with your brief. Encourage and prepare for negative feedback. The best editor will be critical of your work and suggest better ways to communicate the arguments you are making.

Do not accept all of the edits just because your editor has suggested them. Ensure they make sense and fit into your style of writing. You know your argument better than anyone. The editors' purpose is to tell you whether your argument makes sense and whether you can tell it in a better way. You should decide whether they are right before accepting their changes.

If you tend to rely upon the same person to edit your briefs, be careful of trying to write briefs to please that person. When you learn what someone likes in a brief, you tend to write to that style. If you can, change editing partners to avoid writing for your particular editor, rather than for the judges who will ultimately read your briefs.

You may also consider using copy editing software. This software is good at identifying some errors, but is no substitute for an editor who can analyze your brief for effective argument and analysis.

APPENDIXES

- Theories of Appellate Defense
- Potential Criminal Law Issues Checklist
- Copy Editor's Checklist
- Oral Argument Checklist

THEORIES OF APPELLATE DEFENSE

Theories of Appellate Defense

- Structural error occurred, that cannot be corrected.
- The judge made a bad ruling, resulting in prejudice.
- The prosecutor did something bad resulting in prejudice and the judge could or would not stop it.
- The prosecutor did something bad that the judge facilitated, resulting in prejudice.
- The police or some other witness did something bad, resulting in prejudice.
- A juror did something improper, resulting in prejudice.
- Some external event prejudiced the trial.
- The defense lawyer did something improper, resulting in prejudice.
- The evidence was insufficient to support the verdict.

POTENTIAL ISSUES IN CRIMINAL CASES

This brief outline highlights potential issues, but is in no way exhaustive.

Pretrial motions

- Sufficiency of the charging instrument
- Severance (of parties and issues)
- Double jeopardy
- Competency to proceed
- Speedy trial (constitutional and statutory)

Right to counsel

- Failure to appoint counsel
- Failure to discharge counsel
- Inadequate colloquy on the right to proceed pro se

Pretrial hearings (including suppression of the evidence)

- Physical evidence
- Statements
- Identification
- Electronic surveillance

Discovery

- Brady violations
- Compliance with discovery rules
- Access to witnesses

Right to be present

Right to a public trial

Sufficiency of the evidence

Adequacy of guilty plea

Trial evidence

- Evidence of prior acts/uncharged crimes
- Expert testimony
- Hearsay
- Right to confrontation

Prosecutorial misconduct

- Jury selection
- Opening statements
- During trial
- Closing arguments

Ineffective Assistance

- Failure to investigate
- Failure to prepare
- Failure to raise a defense
- Failure to offer instructions
- Conflicts of interest
- Ineffective plea bargaining including failure to communicate offer
- Erroneous advice
- Failure to mitigate

Judicial misconduct

- Refusal to recuse
- Appearances of impropriety

Expert witness testimony/challenges to forensic science

Jury instructions

- Commenting on the Evidence
- Defenses
- Presumptions
- Use of hypotheticals
- Unbalanced or inaccurate marshaling
- Any deviations from the standard instruction

Jury selection and deliberation

- Improper denials of challenges for cause
- Discharge of sworn juror
- Contact with outsiders (if sequestration ordered)
- The court's answers to jury questions

Sentencing

- Challenges to prior history
- Sentences outside standard range
- Failure to take into account mitigation
- Improper comments by the prosecutor

COPY EDITOR'S CHECKLIST

Readability

- Sentences are clear, direct, and concise.
- Repetition and parallel structure are used effectively.

Style

- Heads, lists, and sentences have parallel construction.
- Voice and tone are consistent.

Transitions

- Text is easy to follow.
- Information is complete and appropriately placed.
- Transitions between parts, chapters, and sections are clear.
- Transitions are effective on screen and on paper.

Grammar

- Sentences are complete.
- Subjects and verbs, and pronouns and antecedents agree.
- Verb tense is consistent.
- Modifiers are used appropriately.
- Long sentences are divided for readability.

Punctuation, Capitalization, and Spelling

- Punctuation and capitalization is consistent and follows editorial guidelines.
- Spelling mistakes are corrected.

COPY EDITOR'S CHECKLIST

Mechanics

- Typeface is consistent throughout brief.
- Abbreviations and acronyms are eliminated or defined.
- Numbers and symbols are consistent.
- Figures and tables are referred to in preceding text.
- Footnotes are used correctly.
- Page numbers are correct.

Formatting and Layout

- Brief conforms to office brief standards.
- Standard templates and formats are used.
- Page breaks and line breaks are effective.

Graphics and Illustrations

- Graphics and illustrations are consistent throughout the brief.

Front Matter

- Title page is correct.
- Table of contents is formatted correctly.
- Table of authorities is formatted correctly.
- Page numbers are correct.

Back Matter

- Appendixes are in the correct order.
- Page numbers are correct.

ORAL ARGUMENT CHECKLIST

Days before the argument

- Memorize and repeat your opening and closing thirty seconds
- Prepare an outline and a system for quickly finding answers to anticipated questions
- Create a list of important cases and transcript references
- Rehearse with hostile and friendly questioning

Create a positive mindset

- Positive self talk before the argument
- Own the room
- Invite questions as an opportunity to win

The day of the argument

- Warm up vocally and physically
- Spar with someone else in the hour before the argument to be mentally ready

During the Argument

- Don't have a word for word script in your line of vision
- Listen
- Answer the questions as directly as possible
- Shift Big Picture/Little Picture to handle tough questions
- Move to indicate transitions and distinguish concepts
- Anticipate your clock so you can finish strongly

After the argument

- Pay attention during the government's argument and avoid clear visual clues of your disagreement
- Prepare responsive rebuttal